2011 IL App (3d) 100027-U

Order filed August 31, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0027
v.	)	Circuit No. 08-CF-675
	)	
KEYOMO T. SMITH,	)	The Honorable Kathy Bradshaw-Elliot,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Wright concurs in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: Defense counsel did not provide ineffective assistance when he failed to object to the admission a prior inconsistent statement of a State's witness because the court's basis for admitting the statement was unclear, and, because when viewing the totality of counsel's assistance, he otherwise attacked the statement and put forth a vigorous defense.

¶ 2 The court convicted defendant Keyomo T. Smith of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and imposed a five-year term of imprisonment. Defendant appeals, contending, among other things, that he received ineffective assistance of counsel because counsel failed to properly object to the admission of a witness' prior inconsistent statement on the grounds that the witness did not have personal knowledge of the event he described in the statement. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with one count of unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2008). The charge stemmed from an incident on October 13, 2008, where defendant, who had previously been convicted of the felony of first-degree murder, possessed a handgun. Defendant waived his right to a jury trial, and the cause proceeded to a bench trial. The State introduced a certified copy of defendant's prior felony conviction for first-degree murder.

¶ 5 Illinois State Trooper Kurt Quick testified that during the early morning hours of October 13, 2008, he was at St. Mary's hospital on an unrelated case. While Quick was at the hospital, he received a report of a shooting by defendant, who had been driving a gray Cadillac. Thereafter, Quick left the hospital. En route to his destination, Quick saw a gray Cadillac parked at a Shell gas station, so he pulled into the gas station and parked his car. Quick, who knew defendant from playing basketball with him in a fall league in Braidwood for the past couple of years, saw defendant exit from the interior of the gas station and enter the driver's seat of the Cadillac. Quick approached the Cadillac from the passenger side, and he noticed that someone standing near the window of the gas station was speaking to defendant. As Quick approached defendant's

vehicle, defendant rolled down the passenger window and said " '[h]ey, Kurt[.]' " According to Quick, as he approached defendant's vehicle, he saw what he believed was a weapon between the middle console and the floorboard of the vehicle. At that time, Quick ordered defendant to exit the car. Defendant, however, "sped off[,]" and Quick did not give chase.

¶ 6 Quick further testified that he had specialized firearms training, and that he was the certified instructor who taught incoming cadets how to shoot, break down, and clean their weapons. Quick believed, based on his specialized experience with weapons, that he saw the black butt of a semiautomatic pistol on the floorboard of defendant's car.

¶ 7 Gregory Nickens, defendant's father, testified that he owned the gray Cadillac driven by defendant at the time of the instant incident. According to Nickens, he "cosigned" with defendant for the vehicle because he had better credit than defendant. According to Nickens, he went to defendant's mother's home around 7 or 7:30 a.m. on October 13, 2008, to speak with defendant about some "trouble" defendant had encountered earlier that morning. Nickens saw the gray Cadillac parked at the home, and observed that it was muddy, missing a hubcap and a sensor, and had a bullet casing in the trunk. Nickens stated that after he waited for about a minute, defendant exited the home to speak with him.

¶ 8 Over defense counsel's objection, the court permitted Nickens to testify about portions of the conversation he engaged in with defendant. In response to whether defendant described the trouble that he had earlier that morning, Nickens replied that he "may have it mixed up on who, if it was rounds that was shot were being shoot—shootin' at [defendant]—or [defendant] shot back."

¶ 9 At that time, the State attempted to introduce a statement made by Nickens to Kankakee police Lieutenant Robin Passwater on November 19, 2008, regarding the conversation he had with defendant on the morning of October 13, 2008. The record indicates that Nickens' statement consisted of two typed single-spaced paragraphs, totaling approximately one page in length. As soon as the prosecutor attempted to question Nickens about the contents of the statement, defense counsel objected. The court determined that it would permit the prosecutor to proceed with questioning to ascertain whether the State could properly impeach Nickens. Defense counsel stated that Nicken's "testimony [stood] on what his testimony [was]," and that if the statement "[was not] helping refresh his recollection in any way," and "[was not] given under oath," then it should not be admitted under section 115-10.1 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10.1) (West 2008)). The court reserved its ruling and permitted the prosecutor to continue questioning Nickens. The prosecutor then asked whether Nickens informed Lieutenant Passwater that defendant stated that he had "emptied a few rounds" at the individuals with whom he had trouble. Nickens acknowledged that his statement contained this remark, but testified that he was "not so sure about anything." At that point, defense counsel renewed his objection, and the court determined that it would "let it stand, the impeachment."

¶ 10 The prosecutor then asked Nickens whether he informed Lieutenant Passwater that defendant stated that he sped away from Quick because defendant had a pistol in the car, to which Nickens answered in the affirmative. The prosecutor then told Nickens that he was "not trying to trip [him] up."

¶ 11 On cross-examination, Nickens stated that he did not recall much of the statement that he provided to Passwater on November 19, 2008, and that he did not read the statement after Passwater typed it, he merely signed it. Nickens also stated that the reason for his visit to the police station that day was to try to recover the Cadillac because the company that had extended credit to him and the defendant was attempting to collect payments from Nickens, and Nickens could not make these payments.

¶ 12 The State moved to admit Nickens' entire written statement, and defendant objected. The court recessed to consider the matter, and ultimately allowed the State to admit one sentence of the statement. Specifically, the court permitted the State to admit the phrase " '[defendant] then told [Nickens] he emptied a few rounds at them[,]" ' because Nickens testified that he was not sure if defendant shot at the others, or if the others had shot at defendant. In doing so, the court stated that it was "only [going to] let that sentence in under impeachment," and that it was admitting the sentence under "725 ILCS 5 115-10.1," as the sentence "narrate[d], describe[d], or explain[ed] an events (sic) or condition of which the witness ha[d] personal knowledge." The docket sheet, however, indicates that the court admitted "one line only [of Nickens' statement] for impeachment." The court further stated that it was not going to admit the remainder of Nickens' statement because the "rest of the statement, the two paragraphs basically, were all testified to by [Nickens]."

¶ 13 Donte Brooks testified on defendant's behalf that he was at the Shell gas station speaking with defendant around 5 or 5:30 a.m. on October 13, 2008. Brooks stated that he was standing at driver's side of the vehicle and speaking to defendant through the driver's side window, Quick pulled up, exited his vehicle with his gun drawn and began yelling at the men. According to

Brooks, at that time defendant stated that he did not want another ticket, so he left the gas station. Brooks stated that he did not see a weapon in defendant's vehicle, and did not see any shell casings in or on the car.

¶ 14 Annette Williams, the mother of one of defendant's children, and Cornelia Smith, defendant's mother, also testified on his behalf. Williams stated that defendant was at her apartment in Chicago at 6 or 6:30 a.m. on October 13, 2008, to watch their son because she had to go to work. Smith stated that defendant did not have the keys to her home, only came over in the evenings for dinner, and that defendant was not at her home between 7 or 7:30 a.m. on October 13, 2008.

¶ 15 The court took the matter under advisement and convicted defendant as charged. The court believed the case centered on the credibility of the witnesses and the "gun issue." The court "found [that] the State's witnesses [were] far more credible than the Defense witnesses." The court further found that Quick, who had extensive firearms training, saw a gun in defendant's car. The court also noted that defendant fled when Quick approached him. The court stated that it "[did not] believe [that defendant] would flee from Shell, with the trooper out there that [defendant knew] because [defendant thought Quick was going to] give him a traffic ticket." The court also believed Nickens' testimony that he spoke with defendant in Kankakee at Smith's home around 7 or 7:30 a.m. on October 13, 2008, and that defendant informed him that he was involved in a situation where others shot at defendant or defendant shot at others. The court also stated that Nickens subsequently gave a very detailed statement to police, including that defendant informed Nickens that he left the scene because he had a gun in his car.

¶ 16 On October 1, 2009, the court sentenced defendant to a five-year term of imprisonment. Defendant filed a motion to reconsider his sentence on January 4, 2010, and the court conducted a hearing on it that day. While the defendant contended that his sentence of a five-year term of imprisonment was excessive, the State argued that it had requested a 14-year term of imprisonment, that defendant was eligible for an extended term, and that it saw "no reason" to change defendant's sentence. The court denied defendant's motion to reconsider. Defendant appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant contends that he received ineffective assistance of counsel because counsel failed to properly object to the admission of a witness' prior inconsistent statement because the witness did not have personal knowledge of the event he described in the statement. The State contends that defense counsel provided effective assistance because the challenged statement was admitted only to impeach the witness; thus, defendant's proffered objection would not have been applicable to the court's basis for admission for the one sentence. Because our review of the record reveals that the totality of defense counsel's assistance was effective, we affirm. Before we address the merits of the instant cause, we comment on defendant's jurisdictional concern.

¶ 19 Specifically, in his appellate brief, defendant acknowledged that he filed an untimely motion to reconsider his sentence. However, defendant asserts that this court has jurisdiction to consider the instant appeal under the revestment doctrine, as the State participated in the hearing on the motion to reconsider defendant's sentence without objection. See People v. Bannister, 236 Ill. 2d 1 (2009) (court noted that under the revestment doctrine, the parties may revest a trial

court with personal and subject matter jurisdiction after the 30-day period following the final judgment by actively participating in proceedings that are inconsistent with the merits of the prior judgment). The State concedes that this court has jurisdiction over the instant appeal. We agree, and conclude that we have jurisdiction to consider the merits of this appeal under the revestment doctrine.

¶ 20 For a defendant to establish a claim of ineffective assistance of counsel, the defendant must establish both that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984); People v. Albanese, 125 Ill. 2d 100 (1988). When reviewing counsel's performance, an appellate court must indulge in a strong presumption that counsel's conduct fell within a wide range of reasonable professional conduct. Strickland, 466 U.S. 668. Consequently, matters of trial strategy are protected by a presumption that counsel's actions were the product of reasonable professional judgment, and not incompetence. People v. Clendenin, 238 Ill. 2d 302 (2010).

¶ 21 A reviewing court must determine whether counsel provided effective assistance considering the totality of counsel's conduct, and not isolated instances of conduct. People v. Gapski, 283 Ill. App. 3d 937 (1996). Thus, "[n]either mistakes in trial strategy nor the benefit of another attorney's hindsight are sufficient to demonstrate" that defense counsel provided ineffective assistance. People v. Deloney, 359 Ill. App. 3d 458, 467 (2005).

¶ 22 In this case, when viewing the totality of defense counsel's assistance, we conclude that defense counsel provided an objectively reasonable level of assistance to defendant for two

reasons. First, given the confusion of whether the court admitted the challenged prior inconsistent statement as substantive evidence under section 115-10.1 or as impeachment, counsel was not ineffective for failing to object because Nickens did not have personal knowledge of the event described in that sentence. Second, the totality of counsel's conduct shows that he otherwise challenged that statement, and put forth a vigorous defense.

¶ 23 We first acknowledge that had defense counsel objected to the admission of the challenged sentence on the basis of lack of personal knowledge, the objection should have been granted by the trial court. See People v. McCarter, 385 Ill. App. 3d 919 (2008) (court noted that to have personal knowledge of an event under section 115-10.1(c)(2) of the Code, the witness must have actually seen the event that is the subject of the statement). However, we have reached this conclusion with the benefit of hindsight, as our review of the record reveals, and defendant has acknowledged, that the court's basis for admitting the challenged statement was largely unclear. Specifically, the court stated that it was admitting Nickens' prior statement that defendant "emptied a few rounds" both as substantive evidence under section 115-10.1 and as impeachment. Even after reviewing the appellate record, this court cannot determine with absolute certainty whether the trial court intended to admit the challenged sentence as impeachment, under section 115-10.1, or both. Consequently, given the persistent confusion surrounding the admission of the challenged sentence, when viewing the totality of counsel's assistance, we do not believe that counsel provided ineffective assistance for failing to object to the admission of the challenged sentence on the basis that Nickens did not have personal knowledge of the event he described in the sentence.

¶ 24 Furthermore, regarding the totality of defense counsel's assistance, the record indicates that counsel did not merely object to the admission of the instant challenged sentence, but counsel objected to the admission of Nickens entire prior inconsistent statement. Specifically, defense counsel objected at the time the State proffered Nickens' page long statement, as well as at the conclusion of Nickens' testimony. The court granted defense counsel's objection to all but one sentence of the prior inconsistent statement.

¶ 25 Defense counsel also attacked the voluntariness of Nickens' statement to Passwater. Specifically, defense counsel ascertained that Nickens only visited the police station that day to attempt to retrieve the Cadillac, as creditors were calling him and demanding payment for the vehicle. Defense counsel also ascertained that Nickens did not remember much of the contents of his prior statement, and that he did not read the statement after it was typed, but only signed it. Since the trial court judge, who also sat as the trier of fact in the instant case, would have to read the entire statement and hear all of Nickens' testimony to determine the admissibility of Nickens' prior inconsistent statement, we believe that defense counsel followed an acceptable trial strategy of attacking the circumstances surrounding the entire prior inconsistent statement.

¶ 26 In addition to following the strategy of challenging the voluntariness of Nickens' statement to Passwater, defense counsel also presented witnesses on defendant's behalf. One witness testified that he did not see a gun in defendant's car, and the others testified that defendant was not in the Kankakee area on the morning of October 13, 2008. Therefore, when viewing the totality of counsel's assistance, we conclude that defense counsel provided a reasonable level of professional assistance to defendant.

¶ 27 In defendant's appellate brief, he contends that the trial "court relied on the erroneously admitted statements in finding defendant guilty." However, the trial court admitted only one sentence of Nickens' prior inconsistent statement to Passwater. Along these lines, defendant also states on appeal that the court "relied on inadmissible evidence in finding defendant guilty." However, other than defendant's jurisdictional concern, the only issue raised by defendant in the instant appeal is that defense counsel provided ineffective assistance by failing to object to the challenged statement on the basis that Nickens did not have personal knowledge of the event he had described. Our review of the record, however, indicates that when the court admitted the one sentence of Nickens' prior inconsistent statement, it found that it was not admitting other portions of it because Nickens directly testified to them. Thus, we do not believe that the outcome of the instant trial would have differed had the court not admitted the challenged statement. Furthermore, defendant has not raised an issue on appeal challenging this finding, and has also not raised an issue challenging the sufficiency of the State's evidence underlying his conviction. Consequently, because defendant has levied this allegation in the context of counsel's effectiveness for failing to make a specific objection to the admission of a prior inconsistent statement of a witness, we may not comment on defendant's statement that the court considered inadmissible evidence when it found defendant guilty of the instant offense. See Greenlaw v. United States, 554 U.S. 237, 243 (2008) (Supreme Court stated that, in our adversarial system, courts generally "follow[ed] the principal of party presentation;" thus, courts "rel[ied] on the parties to frame the issues for decision," and typically departed from this principal in criminal cases to protect the rights of a pro se litigant).

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the trial court of Kankakee County.

¶ 30 Affirmed.

¶ 31 JUSTICE HOLDRIDGE, specially concurring:

¶ 32 I concur in the judgment only.